3rd and 4th defendants had notice of the plaintiff's rights in respect of the land when they purchased it from the 1st defendant; and (c) if the said agreement is a licence, whether it is revocable or not.

With regard to the first point, I hold on the authority of *Wijesuriya (H. E.) v. Attorney-General for Ceylon*[1], that the agreement constitutes a licence. That case was an appeal to the Judicial Committee of the Privy Council from the Supreme Court of Ceylon, where it was held that an agreement giving the right "to tap and take the produce of the rubber trees" on certain Crown lands amounted to a licence. Lord Simonds at page 506 said :—

"It appears to their Lordships that, while there are particular provisions which point in either direction, the decisive test is whether on its true construction the effect of the document is to give exclusive possession to the holder of the so-called permit; and adopting this test, they are of opinion that all that is granted by the document is the right to tap and take the produce of the rubber trees within a defined area together with such rights of occupation or possession and other ancillary rights as are necessary to make the primary right effective. They find nothing in the document which would exclude the Crown or its officers from entering on, and making such use of, the land as might be thought fit, subject only to the limitation that in doing so they must not derogate from the rights granted to the grantee. In their Lordships' opinion, therefore, the so-called permit was not a lease but a licence."

In the present case the circumstances are similar.

On the second point, that is whether when the land in question was transferred by the 1st defendant to the purchasers the latter had notice, actual or constructive, of the existing licence in favour of the plaintiff, I hold that there was actual notice. The 2nd and 4th defendants denied that there was such notice. The plaintiff gave evidence to the effect that in his presence the 1st defendant told the 2nd defendant of his (the plaintiff's) rights in this land. The 1st defendant also stated that he informed the 2nd defendant of the plaintiff's rights on at least two occasions and informed all the purchasers of the plaintiff's rights when they met at a solicitor's office for the purpose of executing the transfer. Apart from other considerations of fact I am satisfied that the version of the 1st defendant is the true one; from his demeanour in the witness box I consider that the 1st defendant is a reliable witness.

With regard to the third point, that is whether the licence was revocable at will, Mr. Lee for the 2nd and 4th defendants referred me to *Winter Garden Theatre (London) Ltd. v. Millennium Productions Ltd.*[2]. I do not consider that that case applies to the present case. What that case decided is that a licence for six months with an option to continue for a further six months at an increased rate, without an express provision for determination of the licence by the licensor, is not a perpetual one and can be terminated by giving the licensee a reasonable time to withdraw. In that case the opinion was expressed, *obiter*, that *Wood v. Leadbitter*[3] could no longer be regarded as law; it did not overrule *Hurst v. Picture Theatres*[4] according to which a licence granted for a fixed period for valuable consideration cannot be revoked before the expiration of the period for which it is granted provided that it is specifically enforceable in equity either in an action for specific performance or by way of injunction. In the present case the licence was granted for a period of five years commencing from the 1st May, 1949; the licence is also enforceable in an action by way of injunction (*James Jones & Sons Ltd. v. Earl of Tankerville*[5]), and therefore is not revocable.

The Suit must fail as against the 1st defendant with costs and succeed as against the 2nd and 4th defendants with costs. The 2nd and 4th defendants are to pay to the plaintiff the costs as between the plaintiff and the 1st defendant.

With regard to relief, the plaintiff is asking for an injunction and for damages. The Court has ample jurisdiction to grant the injunction asked for though, of course, it is in its discretion, if it so thinks fit, to award damages in lieu of relief by way of injunction. In view of the fact that the plaintiff has been precluded from exercising the rights under the licence since early 1951 and in view of the fact that the period of the licence is due to expire on the 30th April, 1954, I think this is a case in which it is proper to award damages. I direct that the amount of such damages be ascertained by the Registrar and the basis for ascertaining such an amount is to be the profit which the plaintiff would have made until April, 1954 reckoned on the average of the net profits made annually by the plaintiff during the period in which he exercised the rights under the licence.

Order accordingly.

LEE MIOW YUEN v. YEO HOON CHIONG.

[A. C. J. (Storr, J.) May 24, 1953]

[Muar — Civil Appeal No. 1 of 1953]

Landlord and tenant — Rent payable in advance — Onus of proving — Tender of rent less assessment — Whether a good tender — Sub-letting — Town Board Enactment No. 19 of 1921, s. 40.

The respondent's case in the Court below was briefly that: (i) appellant was his tenant of No. 2 Jalan Khatib, Muar, paying a monthly rent of $25; (ii) it was agreed that the rent was to be paid on the 1st of each month in advance; (iii) the rents of November and December, 1951, were unpaid on the 27th December, 1951, when he called on appellant and demanded payment; (iv) appellant tendered the amount of the rent less the amount of assessment he had paid on respondent's behalf, which tender respondent refused because the assessment had been deducted; (v) on 28th December, 1951, respondent

called on appellant and again demanded rent in full for November and December, but appellant again wanted to deduct assessment to which respondent would not agree and he then served appellant with notice to quit on 31st January, 1952, as rent was 14 days in arrear; and (vi) appellant did not comply with the notice to quit and the respondent brought this action.

The appellant in his defence: (1) denied that the rent of $25 p.m. was payable in advance, but stated it was payable at the end of every month; (2) denied that the rents of November and December were due on the 27th December, 1951, when respondent demanded payment of same; he stated that by agreement he had deducted assessment for the second half of 1951 ($30.12) and tendered the balance of $20 to respondent which was refused; (3) denied that respondent again demanded rent for November and December on 28th December, but admitted receiving a notice to quit the said premises on the 31st January, 1952, and that he remained in possession of the premises after that date as a statutory tenant under section 15 (a) of the Control of Rent Ordinance No. 6 of 1948.

After hearing the evidence in the Court below, the learned Magistrate made an order for the ejectment of the appellant as claimed by the respondent on the ground that there was on the date of service of the notice to quit (i.e. 28th December, 1951) 14 days rent in arrears.

With regard to the question of sub-letting, the learned Magistrate stated that the appellant failed to "prove that there was any agreement in the tenancy to permit sub-letting."

Held: (1) it is usual, in the absence of any express agreement for rent to be paid at the end of the term. The onus therefore of proving an express agreement that it is to be paid in advance is on the landlord; (2) in view of section 40 of Town Board Enactment the tender was a valid one; (3) the onus as to agreement against sub-letting is on the landlord and not on the tenant.

CIVIL APPEAL.

S. Shanmugam for the appellant.

H. N. McLeod for the respondent.

Cur. Adv. Vult.

Storr, J. [After giving the facts as stated in the head-notes His Lordship proceeded]: — He (the learned Magistrate) based his decision on the following findings:—

"It had been established that no deposit of rent was made to the plaintiff (respondent). In view of this and the fact that defendant (appellant) did attempt to pay rents due for November and December, 1951, on 29.12.51, that is the day after the date of the notice to quit and also that defendant on one occasion did pay the rent for a particular month before the end of that month (Ex. D3), I have therefore held that the rent for the premises was payable on the 1st of every month in advance.

"Ex. D1 only shows that the plaintiff agreed to accept the 4 years' rent less cost of repairs and assessment for that one occasion, and does not conclusively prove that this was agreed upon on the commencement of defendant's tenancy.

"No tender of rents of the months of November and December, 1951, was made by the defendant to the plaintiff on 27.12.51 when the latter made a formal demand to the defendant. Defendant has failed to prove that there was any agreement in the tenancy to permit sub-letting.

"As the defendant had allowed the rent due to be in arrears for more than 14 days, the plaintiff was therefore entitled to issue the notice to quit without the sanction of the Rent Assessment Board. The acceptance by the plaintiff of the 4 years' rents, vide Ex. D1, at most amounts to a mere indulgence by the plaintiff. The defendant in this instance can claim no protection under the Ordinance.

"The plaintiff was within his rights when he issued the notice to quit to the defendant. Under the circumstances I have given judgment in favour of the plaintiff in terms of prayers as embodied in the statement of claim."

With regard to the question of sub-letting, the learned Magistrate stated that the appellant failed to "prove that there was any agreement in the tenancy to permit sub-letting." On this finding he has misdirected himself as the onus as to agreement against sub-letting was on the respondent and not on the appellant, as in the words of Woodfall[1]:—

"A tenant for a less term than one year, as for half a year, a quarter, or a month, or the like, may grant his interest, or any portion of it, to another, unless some agreement subsists between him and his lessor, which expressly restricts him from making such disposition."

The learned Magistrate should have found that there was no proof of any express agreement between the parties that there should be no sub-letting.

With regard to his finding that the rent was payable in advance, he seems to have based this on the facts that (1) there was no deposit by appellant, (2) appellant attempted to pay rents for November and December, 1951, on the 29th December, 1951 (i.e. the day after the date of the notice to quit) and (3) on one occasion (December 1950) he did pay the rent before the end of the month. He does not anywhere state that he preferred the evidence of the respondent to that of the appellant. Now the evidence before him on that point was (1) no rent was paid at all from July, 1946, to July 1950, and then $500 was paid and $700 deducted for assessment, repairs, etc. paid by appellant on behalf of respondent, (2) rent for December, 1950, less assessment for the 2nd half of 1950 (i.e. $25 less $22.50) was paid on 23rd December, 1950, (D. 2), (3) rent for July and August, 1951, from which assessment for the 1st half of 1951 was deducted was paid on 8th September, 1951 (Ex. D. 4), appellant tendered rent less assessment for November and December, 1951, on 27th December when respondent demanded it, (5) on 29th December, 1951, after the notice to quit, appellant sent the amount of the rent for November and December, 1951, less the amount of assessment for the 2nd half of 1951 to respondent at his Singapore address, and (6) respondent stated that there was an agreement to pay rent in advance and there was no deposit, and appellant denied that there was any agreement to pay the rent in advance but admitted that there was no deposit.

Now it is usual, in the absence of any express agreement, for rent to be paid at the end of the term. The onus therefore of proving an express agreement

(1) Woodfall's Law of Landlord & Tenant, 22nd Edn., p. 20.

that it is to be paid in advance is on the landlord (i.e. the respondent). After considering the whole of the evidence on this point, I think the evidence as to the rent being payable in advance is inconclusive and the learned Magistrate has misdirected himself in arriving at the conclusion that the respondent had proved an express agreement that rent was payable in advance as that finding was against the weight of the evidence on the point.

Having come to the conclusion that the learned Magistrate was wrong in deciding that the rent was payable in advance, I must now consider whether his finding as to whether there was a good tender of the rents for November and December on the 27th December, 1951. He has found in effect that the appellant has not proved that there was an agreement that he should deduct assessment from the rent, but by such finding the learned Magistrate has misdirected himself on the law, having overlooked section 40 (continuing section) of the Town Board Enactment No. 19 of 1921, which reads as follows:—

"If the sum due from the owner of any house, building or land on account of any rate or fee is paid by the occupier thereof, such occupier may in the absence of any agreement to the contrary with the owner deduct from the next and following payments of his rent the amount which may have been so paid by him"

and has by such oversight failed to realise that the onus was on the respondent to prove that there was an agreement that assesment should not be deducted. I can find no evidence at all, neither was it alleged by respondent, that there was any such agreement between the parties. The appellant therefore quite properly deducted the assessment from the November and December rents and therefore the tender of $20 with the production of the receipt for the assessment was good tender of the rents for November and December, 1951.

It follows from the above that on the date of the notice to quit (i.e. 28th December, 1951) that the appellant's rent was not 14 days in arrear and the learned Magistrate's order for ejectment must be set aside.

In view of the above decision I find it unnecessary to go into the other points argued before me.

The appeal is allowed with costs here and in the Court below.

Appeal allowed.

PUBLIC PROSECUTOR v. LEE EE TEONG.

[A. Cr. J. (Thomson, J.) September 18, 1953]

[Ipoh — Criminal Appeal No. 53 of 1953]

Gaming — Common Gaming Houses Enactment (Cap. 47), ss. 4(i)(c) & 11 — Assisting in carrying on a public lottery — Evidence of person with special knowledge of methods of gambling — Admissibility of — Evidence Ordinance, No. 11 of 1950, ss. 45, 49 and 98 — Whether Judge or Magistrate can import his personal knowledge on the point in a criminal case.

In the absence of any direct statutory provision to the contrary the rule is that in a criminal prosecution the onus lies on the prosecution to prove every ingredient in the offence charged against the accused person. If the prosecution fail to produce evidence which is believed and which, if unrebutted, would make out every such ingredient then the case must be dismissed without the accused person being called upon to make his defence. If he is called upon to make his defence then the Court must consider the evidence as a whole and, if satisfied that every ingredient of the offence has been proved, then convict.

In a prosecution under section 4(i)(c) of the Common Gaming Houses Enactment (Cap. 47 F.M.S.) for assisting in carrying on a public lottery, the evidence of a detective or other person, who, by reason of experience has special knowledge of methods of gambling, is admissible under sections 49 & 98 (but not under section 45) of the Evidence Ordinance to prove that a document found in the possession of the accused relates to a lottery and thus to raise the presumption under section 11 of Cap. 47 that the accused assisted in the lottery.

But the evidence so given must, in itself, be sufficient to prove that:—

(a) The person giving it had special means (which he must describe) of knowing the habits of persons who conduct and assist in conducting lotteries, and,

(b) Persons who conduct lotteries or collect subscriptions thereto keep records of a particular sort, and,

(c) That the documents in evidence is, in his opinion, such a record.

It is not open to any Judge or Magistrate to import his personal knowledge on the point into a criminal trial so as to help out evidence for the prosecution which would otherwise be inadequate to support a conviction.

[Editorial Note:— The Common Gaming Houses Enactment (Cap. 47) has been repealed and replaced by Common Gaming Houses Ordinance, No. 26 of 1953; section 4(i)(c) has been substantially re-enacted.]

Cases referred to:—

(1) *Rex v. Lim Kim Watt* Braddell's C.G.H. 160.

(2) *Lee Seow Kuan v. Rex* (1940) M.L.J. 211.

(3) *Rex v. Tan Guan* Braddell C.G.H. 174.

(4) *Harilal Gordhan v. Emperor* (1937) A.I.R. Bombay 385, 386.

(5) *Sim Ah Song & anor. v. Rex* (1951) M.L.J. 150.

(6) *Rex v. Soh Eng Chiang* (1937) M.L.J. 247, 248.

CRIMINAL APPEAL.

I. T. Davies (Federal Counsel) for the appellant.

Respondent unrepresented.